LIBRARY
SUPREME COURT U. S.

Office-Supreme Court, U.S.
FILED
AUG 14 1969
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1969.

No. 349.

SALVATO J. SILVERIO,
Petitioner,
v.
MUNICIPAL COURT OF THE CITY OF BOSTON AND CITY OF MEDFORD,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

BRIEF FOR THE RESPONDENT MUNICIPAL COURT OF THE CITY OF BOSTON IN OPPOSITION.

ROBERT H. QUINN,
Attorney General,
JOHN WALL,
Assistant Attorney General,
Chief, Criminal Division,
EDWARD W. HANLEY III,
Assistant Attorney General,
Attorneys for Respondent,
373 State House,
Boston, Massachusetts 02133.

ADDISON C. GETCHELL & SON, INC., LAW PRINTERS, BOSTON.

Table of Contents.

Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	5
Conclusion	12

Table of Authorities Cited.

CASES.

Braden v. United States, 365 U.S. 431 (1961)	10
Cleary v. Cardullo's Inc. 347 Mass. 337 (1964)	10
Commonwealth v. Doherty, 353 Mass. 197 (1967)	8
Commonwealth v. Geagan, 339 Mass. 487 (1959)	8
Commonwealth v. Hill, 11 Cush. (Mass.) 137 (1853)	7, 8
Gardner v. Broderick, Police Commissioner of the City of New York, 392 U.S. 273 (1968)	7
Garrity v. New Jersey, 385 U.S. 493 (1967)	7
Huntoon v. City of Quincy, 349 Mass. 9 (1965)	6
Meehan v. Macy, 392 F. 2d 822 (1968)	11
Sinclair v. United States, 279 U.S. 263 (1929)	10
Spevack v. Klein, 385 U.S. 511 (1967)	7
Sullivan v. Municipal Court of Roxbury District, 322 Mass. 566 (1948)	11n.
Uniformed Sanitation Men Assn., Inc. v. Commissioner of Sanitation of the City of New York, 392 U.S. 280 (1968)	7

United States v. American Tobacco Co. 177 Fed. 774 (1910) 8

United States v. United States District Court, 238 F. 2d 713 (1956), cert. den. sub nom., Valley Bell Dairy Co. v. United States, 352 U.S. 981 9

Uphaus v. Wyman, 360 U.S. 72 (1959) 12

STATUTES.

28 U.S.C. 1257 (3) 2

Mass. G.L. c. 31, §§ 43 (a), 45 4, 5

Mass. G.L. c. 277, § 5 8

MISCELLANEOUS.

Rules and Regulations of the Police Department of the City of Medford, chapter III, §§ 16, 92, 93 2n., 3n.

In the Supreme Court of the United States.

OCTOBER TERM, 1969.

No. 349.

SALVATO J. SILVERIO,
Petitioner,
v.
MUNICIPAL COURT OF THE CITY OF BOSTON AND CITY OF MEDFORD,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

BRIEF FOR THE RESPONDENT MUNICIPAL COURT OF THE CITY OF BOSTON IN OPPOSITION.

Opinion Below.

The opinion of the Supreme Judicial Court is reported at 1969 Mass. Adv. Sh. 691 and 247 N.E. 2d 379.

Jurisdiction.

The judgment of the Supreme Judicial Court was entered on April 10, 1969, and modified, after a request for rehearing, on April 18, 1969. The request for a rehearing was

denied on April 18, 1969. The jurisdiction of the Court is invoked under 28 U.S.C. 1257 (3).

Question Presented.

Whether a police officer can properly be discharged for refusing to answer the questions of his superior officer relating to his knowledge of the involvement of persons in criminal activity?

Statement.

Petitioner was a patrolman in the police department of the City of Medford (R. 5)[1] prior to his discharge on March 30, 1965 (R. 6). On March 16, 1965, the acting chief of police (O'Leary) requested, by a letter hand-delivered to petitioner, that he report to his office at 2:00 in the afternoon on the following day (R. 5, 7). Accompanied by counsel, petitioner appeared at the designated time (R. 5). Present were O'Leary, Mr. Gallagher (the city solicitor) and one Conri (a police lieutenant who was head of the vice squad) (R. 8, 9). The conference was transcribed by a police stenographer (R. 5). O'Leary told petitioner that the purpose of the meeting was ". . . to find out what you can tell us, you can tell me as your superior officer in the discharge of your duties under the Rules and Regulations of the Police Department[2] as to whether things

[1] The letter "R" followed by a number is a reference to pages in the record of the Supreme Judicial Court now on file in this Court.

[2] The relevant portions of chapter III of the Rules and Regulations of the Police Department of the City of Medford are as follows:

"§ 16. Members and employees of the Department shall communicate promptly to the Commanding Officer all crimes, suicides,

have gone on in this city which you should have reported" (R. 10).

Petitioner was then asked a series of questions concerning his knowledge of certain persons who were involved in an auto theft ring involving them and three other Medford policemen who were under indictment (R. 8-15). Additionally, he was asked whether he himself had been summoned by the grand jury, had reported to the grand jury to testify, or had refused to testify, and, if he had refused to testify, on what grounds such refusal had been made (R. 12-13).

The interrogation concluded with the following questions (R. 14):

> "Do you have any information regarding any felony or any person wanted on a felony charge?
>
> "Do you have any suspected violations you wish to report?"[3]

---

attempted suicides, fires, accidents, and all important happenings, complaints, and information of which the Department takes cognizance, which may come to their attention. Any member or employee withholding 'tips' or information with a view to personal achievement or for any other reason shall be subject to charges.

"§ 92. Members having information regarding any felony, or any person wanted on a felony charge, shall immediately give all details to their Commanding Officer.

"§ 93. Members shall report all suspected violations coming to their attention, as well as all information they may get about any violation or suspected violation." (R. 22).

[3] Petitioner was asked the following questions (R. 10-14):

1. "Do you know William McGovern of 230 Gaston Street, Medford?"
2. "Do you know William McGovern of 230 Gaston Street, Medford?"
3. "Have you ever been to his house in Medford?"
4. "Have you ever visited his place of business in Charlestown?"
5. "Have you ever done any business with him?"
6. "Do you know Richard M. Penta, formerly of Medford and now of Peabody?"

The petitioner refused to answer all questions on the advice of his counsel on the proffered ground that to do so would be violative of his duty to maintain the secrecy of grand jury proceedings (R. 11, 13, 14).

Thereafter, on March 22, 1965, the appointing authority (the city manager of the City of Medford), acting pursuant to G.L. c. 31, § 43 (a), served petitioner with a "Notice of Hearing" to determine if he should be discharged, removed or suspended from office and therein charged him with conduct unbecoming a police officer and insubordination towards a superior officer (R. 15-16). At the hearing on March 26, 1965, the appointing authority found petitioner guilty as charged and ordered him discharged (R. 17-20). Petitioner, through his attorney, then appealed

---

7. "Have you ever associated with him, either in a business way or a social way or in any way?"
8. "How long have you known him?"
9. "Do you know Thomas Howard of Fulton Street, Medford?"
10. "Have you had business dealings or association with him in any way?"
11. "How long have you known him?"
12. "Do you know whether or not they have a criminal record?"
13. "You were recently summonsed to appear before the grand jury, is that true?"
14. "Did you report to the grand jury at some time?"
15. "Did you go into the grand-jury room?"
16. "Were you sworn as a witness in the grand-jury room?"
17. "Did you take the witness stand in the grand jury room?"
18. "Were you asked a question or questions?"
19. "Do the questions that you refused to testify to have anything to do with suspected automobile thefts or receiving stolen property, namely automobiles, in connection with people known to you, including yourself?"
20. "Did you claim the Fifth Amendment to any questions asked you before the grand jury?"
21. "Did you refuse to testify before the grand jury on the grounds that it might incriminate you?"
22. "Do you have any information regarding any felony or any person wanted on a felony charge?"
23. "Do you have any suspected violations you wish to report?"

to the Civil Service Commission and requested a private hearing (R. 20). The hearing of April 16, 1965, was conducted before a hearing officer who made findings of fact and recommended to the Civil Service Commission that the appointing authority's action be sustained (R. 20-23).

No evidence was offered as to the substance of any of the proceedings before the grand jury. The hearing officer found in part ". . . no legal justification for . . . [petitioner's] silence, where, as in this case, a higher duty demanded by the rules and regulations of his employment calls for him to give information to a superior officer, particularly where the information sought in no way seeks to invade the secrecy of the Grand Jury proceedings themselves, but only information as to his conduct before the Grand Jury" (R. 23). He thus found that petitioner was guilty of conduct unbecoming a police officer (R. 23).

Thereafter the Civil Service Commission voted to accept the report of the hearing officer and to adopt his findings as those of the Commission and concluded that the action of the appointing authority in discharging petitioner was justified (R. 24).

On petition to the Municipal Court of the City of Boston pursuant to G.L. c. 31, § 45, the decision of the Civil Service Commission was affirmed (R. 6). The petitioner then filed a petition for a writ of certiorari in the Supreme Judicial Court which dismissed the petition after the hearing.

Argument.

1. The refusal of petitioner to respond to questions designed to elicit information as to whether he had knowledge of the commission of a crime constituted a breach of his duties as a police officer. Petitioner refused to answer

all questions posed to him except to acknowledge the receipt of a Rule Book (R. 10).

Questions 1 through 12 (fn. 3, *supra*) related to whether or not petitioner knew three individuals and the nature of his association with them, if any. These three individuals were involved in an auto theft ring involving them and three other Medford policemen who were then under indictment (R. 22). The next series of questions (Nos. 13-21, fn. 3, *supra*) related to the conduct of petitioner before the grand jury.

The questioning concluded (R. 14) with the questions (fn. 3, *supra*):

> "Do you have any information regarding any felony or any person wanted on a felony charge?
>
> "Do you have any suspected violations you wish to report?"

In all instances petitioner stood mute. The questions were designed to determine the extent of petitioner's knowledge of criminal activity. Public trust placed in the hands of a police officer requires nothing less than full candor in divulging of information, whether it be obtained from personal sources or in connection with the official duties of a police officer. The duty was imposed on petitioner as an incident of his status as a police officer, as well as by the rules and regulations of the police department of the City of Medford. In the case of *Huntoon* v. *City of Quincy*, 349 Mass. 9, 14 (1965), the Supreme Judicial Court stated:

> "Important among the many duties of police officers, for the protection of the public, are the prevention and detection of crime and the apprehension of criminals."

Nonetheless, petitioner raises several defenses or justification for his refusal to respond to the questions of his superior. Each of those arguments should be rejected and will be considered hereinafter.

2. The failure to discharge his duties by answering the questions posed by his superior officer relating to his duties warranted petitioner's dismissal even though the answers to these questions might have tended to incriminate him. *Gardner* v. *Broderick, Police Commissioner of the City of New York,* 392 U.S. 273, 278 (1968); *Uniformed Sanitation Men Assn., Inc.* v. *Commissioner of Sanitation of the City of New York,* 392 U.S. 280, 284 (1968).

Given the decisions in *Spevack* v. *Klein,* 385 U.S. 511 (1967) and *Garrity* v. *New Jersey,* 385 U.S. 493 (1967) on the one hand, and *Gardner, supra,* and *Uniformed Sanitation Men Assn., Inc., supra,* on the other hand, public officials may be discharged for refusing to divulge to appropriate authority information pertinent to the faithful performance of their offices. See concurring opinion of Mr. Justice Harlan in *Uniformed Sanitation Men Assn., Inc., supra.* While the discharge proceeding of petitioner antedated these cases, the procedural formula approved by these cases was followed.

3. Petitioner argues that he could have left himself open to punishment for contempt by answering the questions of his superior officer (fn. 3, *supra;* R. 10 *et seq.*). However, petitioner's view of the law was clearly erroneous. Only one of the questions asked petitioner could arguably be related to his testimony before the grand jury (fn. 3, *supra,* No. 13). The questions related only to the petitioner's conduct before the grand jury which is not within any general policy of secrecy. *Commonwealth* v. *Hill,* 11 Cush. (Mass.) 137, 140 (1853).

Even if factually the answers might have touched on matters within the general policy of secrecy of grand jury proceedings, that policy is inapplicable to a witness, and even if it does apply to a witness, it did not apply to petitioner in the discharge of his duties as a police officer. Regardless of what the law might be in other jurisdictions, in Massachusetts the oath of secrecy only goes to the jurors (G.L. c. 277, § 5). The obligation of secrecy is found in and limited by statute. This limitation was recognized in the case of *Commonwealth* v. *Geagan,* 339 Mass. 487, 497-498 (1959), where the Massachusetts Court noted that the duties of grand jurors are prescribed only by the statute setting forth their oath of office. Also see *Commonwealth* v. *Hill, supra.* Accordingly, the Massachusetts Court in *Commonwealth* v. *Geagan, supra,* held that the issuance of statements by state and federal officials disclosing what witnesses summoned before the grand jury would testify to or had testified to was not sufficient grounds to quash an indictment.

Furthermore, petitioner, when asked to respond to the questions of acting chief O'Leary, did not simply occupy the status of a "witness" asked to relate idle conversation. He was a police officer charged with the duty of divulging all information regarding crimes to his superiors. It, therefore, is irrelevant even if the general obligation of secrecy does apply to a witness. In many instances, the obligation of secrecy must give way to a higher duty. Thus, in the case of *Commonwealth* v. *Doherty,* 353 Mass. 197, 208 (1967), the Massachusetts Court noted that the fact that a witness had previously testified before a grand jury would be irrelevant to his decision whether to be interviewed by defense counsel.

In *United States* v. *American Tobacco Co.* 177 Fed. 774, 776 (W.D. Ky. 1910), it was held that there was no ground

for abating an indictment where an assistant district attorney made stenographic notes in the grand jury room of testimony and afterwards, while the investigation was still in progress, read them to the district attorney and an attorney for the government who was also participating in the case.

Also, in the case of *United States* v. *United States District Court,* 238 F. 2d 713 (C.A. 4th Cir. 1956), cert. den. sub nom. *Valley Bell Dairy Co.* v. *United States,* 352 U.S. 981, it was found to be error for a district judge, *inter alia,* to have forbidden counsel for the government to have a grand jury transcript to be used in conference with his superiors in the Department of Justice. The Court stated, at 721:

> "There is nothing in the reason of the rule requiring secrecy of grand jury proceedings which precludes counsel assisting in the investigation from having a transcript of the testimony which they have produced before the grand jury or consulting with their superiors in regard thereto."

Information which a police officer obtains and is required to furnish his superiors does not otherwise become secret because that officer may have happened to give this information to a grand jury. To so hold would seriously jeopardize the efficient administration of justice and create an artificial rule not founded in law or logic. Indeed, the effect of petitioner's argument would be to insulate from any other inquiry any matter which had once been disclosed to a grand jury. The grand jury investigative power would thus be turned into a power to foreclose inquiry as to matters which were required to have been divulged prior to grand jury proceedings.

4. Even assuming, *arguendo,* that there is some factual basis to petitioner's argument that he thought that he might be subjected to some form of punishment for answering his superior's questions, his discharge must still stand. Arguments similar to that made by the petitioner have been rejected by this Court. *Sinclair* v. *United States,* 279 U.S. 263 (1929); *Braden* v. *United States,* 365 U.S. 431 (1961), at 437-438.

In *Sinclair,* this Court stated, at 299:

> "There is no merit in appellant's contention that he is entitled to a new trial because the court excluded evidence that in refusing to answer he acted in good faith on the advice of competent counsel. The gist of the offense is refusal to answer pertinent questions. No moral turpitude is involved. Intentional violation is sufficient to constitute guilt. There was no misapprehension as to what was called for. The refusal to answer was deliberate. . . . *His mistaken view of the law is no defense.*" (Emphasis supplied.)

5. Petitioner's argument that the rules are unconstitutionally vague is far from the mark. Firstly, it should not be in issue before this Court because petitioner never placed it in issue in the discharge proceedings. Petitioner did not see fit at any point to declare that he did not in fact understand the rules and regulations or what they required of him. Secondly, the rules and regulations are not obscure, and ordinary men, or at least policemen of common intelligence, are able to understand their meaning. Thirdly, the rules are not of such a nature that a criminal penalty is prescribed for their violation. The enforcement and interpretation of the rules is in the first instance left to the appointing authority. Cf. *Cleary* v. *Cardullo's Inc.* 347 Mass. 337, 344 (1964).

Lastly, as we have already argued, the duty of petitioner to respond to the questions of his superior was an incident of his office above and beyond any duty previously established by the rules and regulations of the police department. Therefore it is hardly relevant that the rules and regulations were unclear, if indeed they were. A policeman is clearly obligated to respond to these questions of his superior designed to elicit the extent of his knowledge of a crime and his discharge is, therefore, warranted for the violation of that duty even in absence of a specific rule or regulation. Cf. *Meehan* v. *Macy*, 392 F. 2d 822, 835 (C.A. D.C. 1968). For these various reasons, this argument of petitioner also does not warrant further review.

6. We have argued that petitioner was discharged for failing to answer all the questions in totality. Since petitioner's total failure to answer all questions was assigned as reason for his discharge it seems unnecessary to consider whether or not certain individual questions were improper; to wit, the question concerning petitioner's knowledge of certain persons. Petitioner's argument regarding any right of association therefore is irrelevant, but nonetheless, since it is an argument which lends itself to disposition on its own merits, we shall consider it briefly.

If perhaps petitioner had been discharged merely because of his personal associations, this argument might have some force.[4] But, he was discharged because he

[4] See, however, *Sullivan* v. *Municipal Court of Roxbury District*, 322 Mass. 566 (1948), wherein an off-duty police officer was taken into custody along with persons who had allegedly committed a crime, and the Court at page 576 said that:

"Conduct becoming a police officer demanded that he should instantly dissociate himself from his companions and clearly align himself on the side of law and order."

failed to respond to the proper inquiries of his superior. The persons who were the subject of the inquiry had been indicted for their participation in an auto theft ring involving them and three other Medford policemen. The interests of the public and the police in determining the fitness of its police officers to serve and in determining whether or not crimes have been committed is sufficiently compelling to subordinate any unlimited right to association. Cf. *Uphaus* v. *Wyman*, 360 U.S. 72, 81 (1959). Whatever petitioner's constitutional right to freedom of association is when considered in the abstract, it is clear that he has no constitutional right to be a policeman under these circumstances. This argument of petitioner also does not warrant further review.

Conclusion.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. QUINN,
Attorney General,
JOHN WALL,
Assistant Attorney General,
Chief, Criminal Division,
EDWARD W. HANLEY III,
Assistant Attorney General.